Glaziers, Architectural Metal and Glass Workers, Local No. 27, Chicago and Vicinity, of the International Brotherhood of Painters and Allied Trades, AFL–CIO *and* E. J. Hayes Glass & Mirror Co. and International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 63, AFL–CIO and Iron Workers District Council of Chicago and Vicinity, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO and Joint Conference Board of the Construction Employers' Association and the Chicago & Cook County Building and Construction Trades Council, Parties-in-Interest. Case 13–CD–545

April 27, 1998

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN AND BRAME

The charge in this Section 10(k) proceeding was filed on September 25, 1997[1] by the Employer, E. J. Hayes Glass & Mirror Co., alleging that the Respondent, Glaziers, Architectural Metal and Glass Workers, Local No. 27, Chicago and Vicinity, of the International Brotherhood of Painters and Allied Trades, AFL–CIO (Glaziers), violated Section 8(b)(4)(ii)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by the International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 63, AFL–CIO (Ironworkers). The hearing was held on October 22 before Hearing Officer Paul Prokop.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.[2]

I. JURISDICTION

The Employer is an Illinois corporation engaged in the installation of glass glazing and architectural aluminum. It annually purchases and receives goods valued in excess of $50,000 into its facility located in Skokie, Illinois, directly from suppliers located outside the State of Illinois. The parties stipulated,[3] and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and 2(7) of the Act. The parties also stipulated, and we find, that the Glaziers is a labor organization within the meaning of Section 2(5) of the Act.[4]

II. THE DISPUTE

A. *Background and Facts of Dispute*

The Employer is engaged in the installation of glass, glazing, and architectural aluminum in the construction industry. In or before June, General Contractor BABCO subcontracted to the Employer the installation of preglazed windows at the Hampton Inn & Suites located at Illinois and Dearborn Streets, Chicago, Illinois. Thereafter, the Employer assigned the unloading, handling, and installing of preglazed windows at Hampton Inn to the employees represented by the Glaziers. In about July, the employees represented by the Glaziers began performing the disputed work.

In about August, the Ironworkers requested a jurisdictional hearing before the JCB concerning the Glaziers' preglazed work at the Hampton Inn & Suites.[5]

[1] All dates are in 1997, unless stated otherwise.

[2] At the hearing, the Ironworkers filed a Motion to Stay Section 10(k) Hearing on the basis that a pending lawsuit in the U.S. District Court for the Northern District of Illinois was the appropriate means of resolving a contractual dispute between the Ironworkers and the Glaziers. The suit alleges that: (1) the Glaziers entered into an agreement with the Ironworkers that gave the latter jurisdiction over the installation of preglazed windows; and (2) the Glaziers violated the agreement by performing the disputed work at two area construction sites and refusing to abide by the determination of the Joint Conference Board of the Construction Employers' Association and the Chicago & Cook County Building and Construction Trades Council (JCB). On September 17, the JCB, a construction industry arbitration panel, awarded the preglazed work to the employees represented by the Ironworkers.

We deny the motion to stay for the following reasons. Sec. 10(k) provides that the Board must ''hear and determine the dispute out of which [the] unfair labor practice shall have arisen, unless . . . the parties to such dispute . . . have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute.'' The Supreme Court has held that the employer controlling the assignment of the work is a necessary ''party'' to the ''dispute'' for purposes of Sec. 10(k). *NLRB v. Plasterers Local 79*, 404 U.S. 116 (1971). Here, however, the Employer is not a party to the lawsuit between the two Unions and is not a party to the alleged agreement between the two Unions. Therefore, regardless of the outcome of the lawsuit between the two Unions, the Board would still be required to ''hear and determine'' the dispute within the meaning of Sec. 10(k). Furthermore, to the extent that a conflict might arise between the court's adjudication of the Unions' contract rights and the Board's determination of the jurisdictional dispute, it is clear that, under *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 272 (1964), the Board's ruling would take precedence. Accordingly, there is no need for the Board to stay the instant 10(k) proceeding.

[3] Counsel for the Ironworkers and counsel for the JCB left the hearing room after the Ironworkers offered its Motion to Stay Sec. 10(k) Hearing, and did not return. Thus, the stipulating parties were the Employer and the counsel for the Glaziers.

[4] No stipulation regarding the status of the Ironworkers as a labor organization was received. We find, however, that the Ironworkers is a labor organization within the meaning of Sec. 2(5) of the Act based on the Board's similar finding in *Bricklayers (Sesco, Inc.*), 303 NLRB 401 (1991).

[5] The Ironworkers also requested that the hearing include similar jurisdictional disputes at Sears Tower, Amerisuites Hotel, and the Main West School.

By letter dated September 5, 1997, the JCB advised the Employer that a hearing was scheduled for September 17 to consider the jurisdictional dispute at Hampton Inn. Neither the Employer nor the Glaziers attended the hearing. By letter dated September 17, the JCB advised the Employer that it awarded the work in question to the Ironworkers. By letter dated September 19, the Glaziers advised the Employer that if it changed its assignment of the disputed work from employees represented by the Glaziers to employees represented by the Ironworkers, the Glaziers would strike and picket to preserve its work jurisdiction.

B. *Work in Dispute*

The disputed work involves the unloading, handling, and installing of preglazed windows at Hampton Inn & Suites, Illinois, and Dearborn Streets, Chicago, Illinois.

C. *Contentions of the Parties*[6]

The Employer stated at the hearing that it has had a collective-bargaining agreement with the Glaziers since 1945 and that it has never had a collective-bargaining agreement with the Ironworkers. The Employer also claimed that the employees represented by the Glaziers possess the skills to perform the disputed work and that its preference is to continue assigning the preglazed work to Glaziers-represented employees. Further, the Employer stated that it is common practice for the employees represented by the Glaziers to perform the disputed work in the area.

In its brief, the Glaziers contend that its threat to strike and picket the Employer if the work were reassigned establishes reasonable cause to believe that Section 8(b)(4)(D) has been violated. The Glaziers also argue that there is no agreed-on method of dispute resolution. Although the Unions may be bound by the JCB decision, the Glaziers contend that the Employer has not agreed to abide by that decision. Thus, the Glaziers argue that under *Plasterers Local 502 (Advance Terrazzo)*, 272 NLRB 810, 811 (1984), there is no method of voluntary dispute resolution binding on all the parties.

Further, the Glaziers argue that the work in dispute should be awarded to employees it represents. The Glaziers contend that its collective-bargaining agreement with the Employer covers the disputed work and that the Employer has consistently assigned the disputed work to employees it represents for the past 40 years. The Glaziers also contend that the employees it represents are trained for 4 to 6 months to perform the disputed work, and they have the requisite skills to perform the work. In addition, the Glaziers claim that members of the Glazing Contractors Association of Chicago and Vicinity (Glazing Association) exclusively employ Glaziers-represented employees to perform similar work, and that only Glaziers-represented employees perform the disputed work on 10 similar projects in the area. The Glaziers also rely on the Employer's preference, and economy and efficiency of operations. Moreover, the Glaziers seek a broad award covering the disputed work at both the Hampton Inn and the Sears Tower.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be established that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated, and that the parties have not agreed on a method for voluntary adjustment of the dispute. As noted above, by letter dated September 19, the Glaziers threatened the Employer that, if the Employer changed its assignment of the disputed work from the Glaziers to the Ironworkers, the Glaziers would strike and picket to preserve its work jurisdiction. We find that this threat is sufficient to establish reasonable cause to believe that Section 8(b)(4)(D) has been violated.

Further, we find that there is not an agreed-upon method for voluntary resolution of this dispute. The record contains a 1985 ''tentative agreement'' between the Glaziers and the Ironworkers which outlines the jurisdiction of each labor organization and provides that if the Unions cannot reach an understanding concerning the interpretation or application of the agreement, ''they shall immediately go to the Chicago Joint Board for jurisdictional hearings.'' We find that, even assuming that the Glaziers and the Ironworkers are bound by the ''tentative agreement,'' there is still no agreed upon method of voluntary resolution of the dispute within the meaning of Section 10(k) because the Employer is not a party to the agreement. It is settled that the Board may defer to a private tribunal only when all the parties involved in the dispute have agreed to be bound. *NLRB v. Plasterers Local 79*, 404 U.S. 116 (1971); *Plasterers Local 502 (Advance Terrazzo)*, supra. Similarly, although the JCB issued a determination awarding the disputed work to the employees represented by the Ironworkers, the Employer is not bound by the JCB proceedings. Accordingly, there is no basis to find that all the parties have agreed on a method for the voluntary adjustment of this dispute. See *Bricklayers (Sesco, Inc.)*, supra.

Based on the foregoing, we find reasonable cause to believe that the Glaziers violated Section 8(b)(4)(ii)(D) of the Act, and that there exists no agreed-on method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

[6] The posthearing brief filed by the Ironworkers was untimely and was not accepted by the Board. The Employer did not file a brief.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

Neither the Glaziers nor the Ironworkers are certified as the collective-bargaining representative of any of the employees performing the work in dispute.

The Employer, as a member of the Glazing Association and as an individual signatory, has a collective-bargaining agreement with the Glaziers. The most recent local collective-bargaining agreement is effective from June 1, 1995, through May 31, 1998. Article VI, section 1 of the local agreement covers the work in dispute.[7] The Employer does not have a collective-bargaining agreement with the Ironworkers or with the Iron Workers District Council of Chicago and Vicinity. Accordingly, we find that the factor of collective-bargaining agreements favors awarding the work in dispute to the employees represented by the Glaziers.

2. Employer preference and past practice

The Employer assigned the disputed work to the employees represented by the Glaziers, and the Employer maintains a preference for that assignment. In addition, work similar to that in dispute has been performed by the employees represented by the Glaziers for the past 40 years. We find that this factor favors an award of the disputed work to employees represented by the Glaziers.

[7] Art. VI, sec. 1 states in part that:

> Journeyperson Glaziers or Apprentices will be employed in the following classifications: general glazing, including the setting, cutting, preparing, handling . . . . or removal of window glass . . . . .
>
> The installation of all extruded, rolled, or fabricated metals or any materials that replace same, metal tubes, mullions, metal facing materials, muntins, facia trim moldings, porcelain panels, architectural porcelain, plastic panes, skylights, showcase doors and relative materials including those in any or all types of building related to store front and window construction.
>
> Door and window frame assemblers such as patio sliding or fixed doors, vented or fixed windows, shower doors, bath tub enclosures, storm sash where the glass becomes an integral part of the finished product, including the installation of the above.

3. Area practice and industry practice

It is common practice for the employees represented by the Glaziers to perform work similar to the disputed work in the Chicago area. The Glaziers presented evidence that the Glazing Association members exclusively employ Glaziers-represented employees to install preglazed windows. The Glaziers also presented a list of 10 similar projects in the area performed exclusively by employees represented by the Glaziers. The Ironworkers did not present evidence concerning the area practice. No party presented witnesses or evidence concerning industry practice. We find that the factor of area practice favors an award of the disputed work to employees represented by the Glaziers.

4. Relative skills

The Glaziers presented evidence that the employees it represents participate in a 3-year apprentice trade program consisting of class work and field training, including 4 to 6 months of preglazed window installation training. The Employer testified that the employees represented by the Glaziers possess the requisite skills to perform the disputed work. No evidence was presented by the Ironworkers concerning the skills of the employees it represents. Based on the foregoing evidence, we find that this factor favors awarding the disputed work to employees represented by the Glaziers.

5. Economy and efficiency of operations

The Employer and the Glaziers contended that it is more economical to assign the disputed work to employees represented by the Glaziers because the Ironworkers' wage and benefit package is $36.06 per hour while the Glaziers' wage and benefit package is $33.37 per hour. No evidence was presented by the Ironworkers concerning the economy and efficiency of operations.

The Board does not consider wage differentials as a basis for awarding disputed work. *Longshoremen ILA Local 1242 (Rail Distribution Center)*, 310 NLRB 1 fn. 4 (1993). We, therefore, do not rely on this argument in evaluating this factor. We find that the evidence with respect to economy and efficiency of operations is insufficient to favor awarding the disputed work to employees represented by either Union.

6. Awards

On September 17, the JCB awarded the disputed work to employees represented by the Ironworkers. However, the Employer was not a party to that proceeding and has not agreed to be bound by the JCB's results. Thus, we cannot give dispositive weight to this award. Although this factor favors awarding the disputed work to employees represented by the Ironworkers, we find that this factor does not outweigh

others which favor awarding the disputed work to employees represented by the Glaziers.

Conclusion

After considering all the relevant factors, we conclude that the employees represented by Glaziers, Architectural Metal and Glass Workers, Local No. 27, Chicago and Vicinity, of the International Brotherhood of Painters and Allied Trades, AFL–CIO are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, the Employer's preference and past practice, the area practice, and the relative skills of the employees. In making this determination, we are awarding the work in dispute to the employees represented by the Glaziers, and not to that Union or its members.

Scope of Award

The Glaziers seeks a broad award covering both the disputed work at the Hampton Inn & Suites and a similar dispute at the Sears Tower.[8] The Board has customarily declined to grant an areawide award in cases such as this in which the charged party represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work. *Automotive Trades District Lodge 190 (Sea-Land Service)*, 322 NLRB 830 (1997). Thus, we find that a broad award is inappropriate here. Accordingly, this determination is limited to the controversy that gave rise to this proceeding.

[8] The Sears Tower project is located less than a mile from the Hampton Inn site.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of E. J. Hayes Glass & Mirror Company, represented by Glaziers, Architectural Metal and Glass Workers, Local No. 27, Chicago and Vicinity, of the International Brotherhood of Painters and Allied Trades, AFL–CIO are entitled to perform the unloading, handling and installation of preglazed windows at Hampton Inn & Suites, Illinois & Dearborn Streets, Chicago, Illinois.